Supreme Court, U.S.
FILED
NOV 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-748

In The
Supreme Court of the United States
October Term, 1986

UNITED STATES ex rel. Chunie, et al.,

Petitioners,

vs.

MARIE RINGROSE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

This Reply Brief[1] is filed pursuant to Rule 22.5 of the Rules of the United States Supreme Court and ad-

[1]Private Respondents state that "[a]lthough the United States was named as a plaintiff in this suit, petitioners apparently have not obtained the consent of the United States to sue in its name." Joint Brief at iii-iv.

The Chumash filed this suit as a *qui tam* action under the authority of 25 U.S.C. 201 to collect penalties under 25 U.S.C. 179 and 180. Section 201 provides that "[a]ll penalties which shall accrue under this title shall be sued for and recovered in

(Continued on following page)

dresses issues presented in the Briefs in Opposition to the Petition for a Writ of Certiorari filed by the State of California and Private Respondents.

ARGUMENT

I. PRIVATE RESPONDENTS' ARGUMENTS THAT SUPREME COURT CASES SUPPORT THEIR POSITION THAT THE 1851 ACT EXTINGUISHED ABORIGINAL INDIAN TITLE IS CORRECT AS TO SOVEREIGN OR FEE TITLE, BUT INCORRECT AS TO ABORIGINAL INDIAN TITLE.

In Argument I of the Joint Brief, Private Respondents argue that an unbroken line of case authority has held that title confirmed in proceedings under the Act of 1851 (9 Stat. 631) is conclusive and not subject to collateral attack. Joint Brief at 7-19. The State of California makes similar arguments in its Brief. State Brief at 1-3. Both Private Respondents and the State, however, fail to understand that the 1851 Act was concerned with perfecting *fee title* only, since only fee title can be "derived" from the Spanish and Mexican Governments.

Fremont v. United States, 58 U.S. (17 How.) 542 (1855) and *United States v. Fossatt*, 62 U.S. (24 How.) 445 (1859) do not concern Indians or aboriginal Indian title claims. *Barker v. Harvey*, 181 U.S. 481 (1901), *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924),

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an action in the nature of debt, *in the name of the United States*, before any court having jurisdiction over the same, in any State or Territory in which the defendant shall be arrested or found, the one half to the use of the informer and the other half to the United States . . ." [Emphasis Supplied]. Thus, the authority for the Chumash to sue in the name of the United States is contained in 25 U.S.C. 201.

and *Super v. Work*, 3 F.2d 90 (D.C. Cir. 1925), aff'd. per curiam 271 U.S. 643 (1926), also do not support Respondents' positions, since they concern Indian interests derived from the Mexican Government and not aboriginal Indian title.

The Appeal Panel correctly noted that the defendants in *Barker* "[a]s Mission Indians . . . apparently claimed a right of occupancy derived from the Mexican Government" and correctly concluded that this fact "would support the Court's holding on the basis that the Indians' rights were 'derived from the Mexican government' and thus subject to the filing requirement of the Act of 1851." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 645 (9th Cir. 1986), Appendix at B-12 to B-13.

The Appeal Panel found that in *Title Insurance*, the Indians claimed a "perpetual right" to occupy land for which the Mexican government had granted and for which a confirmed patent had been issued and that the Indians' claims were lost by failing to present them to the 1851 commission. The Appeal Panel noted that the Indians claimed an "aboriginal right of occupancy." *Ringrose, supra*, 788 F.2d at 645. The "perpetual right" of occupancy in *Title Insurance*, however, arose "under the laws of Mexico" on a theory of adverse possession. *Title Insurance, supra*, 265 U.S. at 482. Thus, *Title Insurance*, like *Barker*, involved a claim derived from the Mexican Governments: "Enough has been said to make it apparent that [the *Barker*] case and this are so much alike that what was said and ruled on in that should be equally applicable in this." 265 U.S. at 485-486. Accord, *Summa*

Corp. v. California ex rel. State Land Commission, 466 U.S. 198, 209 (1984).

The Appeal Panel further found that the same principle applied to the Indians in *Super v. Work*, 3 F.2d 90 (D.C. Cir. 1925). See *Ringrose, supra*, 788 F.2d at 645, Appendix at B-13. Citing *Barker v. Harvey*, the appeals court in *Work* noted that the rights of the Indians differed from the Indians in *Barker* and *Title Insurance* "only to the extent that in those cases they were Mission Indians, while, in the present case, at and prior to the cession by Mexico, the plaintiff Indians were merely roving bands," and found that the Indians abandoned their claims by failing to present them to the 1851 Commission. *Work, supra*, 3 F.2d at 91. The Supreme Court summarily affirmed on this basis. See 271 U.S. at 643. Thus, the claims of the Indians in *Work*, like the claims of the Indians in *Barker* and *Title Insurance* were derived from the Mexican Government and hence must have been presented in the land confirmation proceedings undertaken pursuant to the 1851 Act.

Private Respondents citation of *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), for the proposition that the 1851 Act applied to claims in California based on aboriginal Indian title is misplaced. What the Court found in *Santa Fe* was that Indian claims to occupancy, like those in *Barker* and *Title Insurance*, were subject to the 1851 Act. *Santa Fe, supra*, 314 U.S. at 350.

The Indians in *Cramer v. United States*, 261 U.S. 219 (1922),—unlike the Indians in *Barker, supra, Title Insurance, supra* and *Work, supra*—made a claim based on aboriginal Indian title and not upon title or interests de-

rived from the Mexican government. The Court stated that:

> Unquestionably, it has been the policy of the Federal government from the beginning to respect the Indian right of occupancy, which could only be interferred with or determined by the United States. * * * It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that, in its essential spirit, it applies to individual Indian occupancy as well . . . *Id.* at 227.
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> * * *
>
> It is insisted that any rights these Indians might otherwise have had are barred by the provisions of the Act of March 3, 1851, 9 Stat. at L 631, Chap. 41. This statute required every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments to present the same for settlement to a commission created by the Act. There was a provision directing the commission to ascertain and report the tenure by which the mission lands were held and those held by civilized Indians, and other Indians described. *The act plainly has no application. The Indians here concerned do not belong to any of the classes described therein, and their claims were in no way derived from the Spanish or Mexican governments. Id.,* 261 U.S. at 230-231. (Emphasis Supplied.)

Private Respondents attempt to distinguish *Cramer* on the basis that it involved individual tribal occupancy rather than nomadic tribal occupancy. Their position, however, overlooks the Court's ruling in *Santa Fe, supra,* 314 U.S. at 346, that individual aboriginal Indian title is "not

to be treated differently from 'the original nomadic tribal occupancy.' "[2]

II. ABORIGINAL INDIAN TITLE IS NOT A CREATURE OF A CONQUERING SOVEREIGN'S LAW, BUT IS RATHER A PRINCIPLE OF INTERNATIONAL LAW BASED ON THE DOCTRINE OF DISCOVERY.

In Argument II of the Joint Brief, Private Respondents argue that aboriginal Indian title does not depend upon international law, but is rather a creature of a conquering sovereign's law and neither *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) or *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823), support petitioners' assertions regarding the source of aboriginal title. Joint Brief at 19-23. They argue that "*Johnson v. M'Intosh* recognized that aboriginal title is derived from the law of the conquering sovereign," and "aboriginal title, like every other title, was held in *Barker* to be subject to the act of 1851."[3] Joint Brief at 21.

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[2]Although California has no disclaimer in its Enabling Act (9 Stat. 452), the Court in *Cramer*, stated that "Congress itself, in apparent recognition of possible Indian possession, has in several state enabling acts, required the incoming states to disclaim all right and title to the lands owned or held by any Indian or Indian tribe" and found the policy of protecting "any Indian" as applicable to California. *Id.*, 261 U.S. at 228. If the policy of protecting "any Indian" is applicable to California, then it follows that the policy of protecting the aboriginal Indian title lands of "any . . . Indian tribe" should also be applicable.

[3]As previously noted, *Barker v. Harvey* did not involve an aboriginal Indian title claim. Private Respondents' statement that the *Barker* case held that aboriginal Indian title is subject to the 1851 Act is therefore misplaced.

In support of their argument that aboriginal Indian title does not depend upon international law, Private Respondents state "the language quoted in the petition as the purported 'ruling' of this Court in *Fletcher v. Peck*[4] is merely a recitation of the argument of counsel and is not the opinion of this Court." Joint Brief at 20. This statement is erroneous, however, since the language quoted in the Petition is actually the language of the Court on its interpretation of aboriginal Indian title. Moreover, *Johnson v. M'Intosh*, expressly states that the doctrine of discovery—upon which aboriginal Indian title is derived—was necessarily established as a principle by which the nations of Europe "should acknowledge as the law by which the right of acquisition [of Indian land] . . . should be regulated as between themselves." *Id.* at 572.

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[4]This language reads as follows:

> What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; for they have no idea of a title to the soil itself. It's overrun by them, rather than inhabited. It is not a true and legal possession. *Vattel*, b. 1. § 81. p. 37 and c. 209. b. 2. § 97. *Montesquieu*, b. 18. c. 12. *Smith's Wealth of Nations*, b. 5. c. 1. It is a right regulated by treaties, not by deeds of conveyance. *It depends upon the law of nations*, not upon municipal rights. (Emphasis Supplied)

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 121 (1810)

III. THE NINTH CIRCUIT'S DECISION DID FREEZE INDIAN ABORIGINAL TITLE IN 1848 AND CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT AND COURTS OF CLAIMS.

In Argument II of the Joint Brief, Private Respondents argue that the Appeal Panel's ruling does not freeze aboriginal Indian title in California as of 1848:

> Contrary to petitioner's assertion, the Ninth Circuit did not fix a cut-off date for the establishment of Indian title; the court held only that the last date on which the Chumash lost any claim of aboriginal title derived from a right of occupancy existing under Spanish or Mexican law was two years following the enactment of the Act of 1851. Thus, no conflict exists between the Ninth Circuit's decision and this Court's decision in *Santa Fe* or the Court of Claims' decision in *Sac and Fox Tribe*.

Joint Brief at 24-25.

This assertion is a logical non-sequitur. How can a claim of aboriginal Indian title "derived" from the laws of Mexico exist up to 1853 in California, if the area was ceded by Mexico in 1848? The only way the Appeal Panel could reach its decision that Chumash aboriginal title was "derived" from the laws of Mexico and hence subject to the 1851 Act was to freeze their aboriginal title as of 1848. The Appeal Panel simply refused to recognize Chumash aboriginal title under American law subsequent to 1848. This is directly contrary to the Court's decision in *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railway Co.*, 314 U.S. 339, 345-346 (1941), that aboriginal Indian title survived the 1848 cession of territory

from Mexico to the United States and the Court of Claim's decision in *Sac and Fox Tribe v. United States*, 383 F.2d 991, 998-999 (Ct.Cl. 1967) that aboriginal Indian title is not frozen upon state succession.

IV. PRIVATE RESPONDENTS' CLAIM THAT ESTABLISHED SUPREME COURT AUTHORITY HAS RESOLVED IMPORTANT QUESTIONS AFFECTING LAND TITLES IN CALIFORNIA AND SHOULD NO LONGER BE OPEN IS CORRECT AS TO FEE TITLE, BUT NOT ABORIGINAL INDIAN TITLE.

In Argument IV of the Joint Brief, Private Respondents argue that, for over 100 years, titles to Santa Cruz and Santa Rosa Islands have passed to successive private owners who relied on the record title of their predecessors as initially established under the Act of 1851, and that these titles were confirmed by court decisions and should no longer be open to question. Joint Brief at 25-26. These arguments are valid as to fee title, but are inaccurate as to aboriginal Indian title.

Private Respondents ignore the rule that aboriginal Indian title recognizes the Indians as "the rightful occupants of the soil, with a legal as well as just claim to retain possession," *Johnson v. M'Intosh*, *supra*, 21 U.S. (8 Wheat) at 574, which right of possession "is good against all but the sovereign" and can "be terminated only by sovereign act." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). They also ignore the rule grants in fee "have been understood by all, to convey a title to the grantees, subject only to the Indian right of

occupancy." *Johnson v. M'Intosh, supra,* 21 U.S. (8 Wheat) at 574. Indeed, recent eastern land claims based on aboriginal title are many years older than the Chumash claim. See, e.g., *Oneida County, N.Y. v. Oneida Indian Nation,* 105 S.Ct. 1245 (1986); *Oneida Indian Nation v. County of Oneida, supra; Joint Tribal Council of Passamadquaoddy Tribe v. Morton,* 388 F.Supp. 649 (D.Me. 1974), affd. 528 F.2d 370 (1st Cir. 1975).

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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